IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 20

WALTER C. BRULOTTE AND CECELIA BRULOTTE, his wife,

and

RAYMOND CHARVET AND BLANCHE CHARVET, his wife,
Petitioners,

v.

THYS COMPANY, *Respondent.*

MEMORANDUM OF PETITIONERS IN OPPOSITION TO MOTION OF WELL SURVEYS, INC. (AND DRESSER INDUSTRIES, INC.) FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

Under the provisions of Rule 42(3), Petitioners respectfully object to the motion of Well Surveys, Inc. (and Dresser Industries, Inc.) for leave to file a brief as *amicus curiae.*

The motion is based on the pendency in the United States Court of Appeals for the Tenth Circuit of

Cases Nos. 6592 to 6956. *McCullough Tool Company et al.* v. *Well Surveys, Inc., et al.*, Petitioners' reasons for withholding consent to the filing of such brief are: (1) the proposed brief advances no "facts or questions of law that have not been" or "will not adequately be presented by the parties" as required by Rule 42(3); (2) the record on which the proposed brief is based is not before this Court; (3) the motion was not filed within the time allowed by Rule 42(2); and (4) proposed *amicus curiae* seek to circumvent the refusal of the Tenth Circuit Court of Appeals to certify the misuse question in the cases before it.

1. Proposed Amicus Curiae Advance No "Facts or Questions of Law That Have Not Been" or "Will Not Adequately Be Presented by the Parties" as Required by Rule 42(3)

There are "no facts or questions of law" presented by proposed *amicus curiae* which have not been fully presented by the parties of record.

In an attempt to conform their motion to Rule 42(3), proposed *amicus curiae* inaccurately state the positions of the parties of record and misconstrue the decision of the court below.

As Reason 1 in support of the motion, it is asserted that the disposition of this case may control "not only cases where the acceptance of a royalty base including operations covered by expired patents was *coerced*,[1] but also a case . . . where . . . the acceptance by licensees" of post-expiration royalty obligations "was *voluntary*" (Motion, p. 4). It is said that the case "where the acceptance" of a post expiration royalty

[1] Unless otherwise indicated, all emphasis is supplied.

contract is "voluntary" may not be briefed by the parties. (Reason 3, Motion, p. 4)

The motion, on its face, is inconsistent with the proposed brief which it advocates. That proposed brief at page 11 admits:

> "Petitioners argue on page 26 of their brief, and elsewhere, that use of a royalty base including operations covered by an expired patent is a misuse, even if such use is *not coerced* but *voluntary.*" (Proposed Brief Amicus Curiae, Reason 4, p. 11)

The same purported concern over the "coercion" issue is expressed in each of the additional "Reasons" 2 to 4, inclusive, advanced by Well Surveys and Dresser Industries.

The alleged "Reason" 2 is not a reason at all within the contemplation of Rule 42(3) but merely an argument in support of the "view" of the purported *amicus curiae.*

Reason 3 is an admission that the proposed *amicus curiae* "have not yet seen Respondent's brief in the instant case," coupled with a construction of the opinion of the Supreme Court of Washington—which proposed *amicus curiae* necessarily *did* see—and which is inconsistent with the opinion of that court. In Reason 3 it is stated that:

> ". . . It was the view of the Supreme Court of Washington that inclusion of expired patents in the royalty base, even where *mandatory,* is not a misuse provided the parties clearly intended such inclusion." (Motion, p. 4)

The opinion of the Supreme Court of Washington states:

> "In regard to the contention that the contracts are illegal because they conditioned the grant of

> the license on some patents on acceptance of a license on a larger group of patents, the complete answer is that this is simply not the fact." (R. 109)

While the foregoing statement by the court below appears inconsistent with the record, it nevertheless places the element of coercion directly in issue in the case at bar.

Indeed, Reason 4 (Motion, p. 5) is an *accurate* speculation that "Respondent may argue . . . along the same general lines" as proposed *amicus curiae.*

Respondent's brief, which the would-be *amicus curiae* admit that they "have not yet seen", presents the same argument as Well Surveys and Dresser Industries. It defends the post-expiration royalty contracts in suit specifically on the ground that "there was here *no coercion nor unlawful mandatory* package licensing" (R. Br. 35, 40, 41) (emphasis by Respondent).

The identity of the issue presented by the proposed *amicus curiae* brief and by the briefs of the parties is fully demonstrated by the fact that the *amicus* brief *cites not a single authority which is not also relied upon for the same purpose by at least one of the parties of record.*

In short, the very "coercion" issue on which Dresser Industries and Well Surveys rely in support of the motion is squarely before the Court on its merits. The proposed brief *amicus curiae* is superfluous. The motion is moot.

Moreover, the element of "coercion" is inapposite to the basic illegality inherent in any licensing arrange-

ment which includes expired patents in the royalty base.

> "It is self-evident that on the expiration of a patent the monopoly created by it ceases to exist, and the right to make the thing formerly covered by the patent becomes public property. It is upon this condition that the patent is granted. . . . the patentee or manufacturer . . . [cannot] take the benefit and advantage of the patent upon the condition that at its termination the monopoly should cease, and yet when the end was reached disregard the public dedication [] practically perpetuate indefinitely an exclusive right." *Singer Mfg. Co.* v. *June Mfg. Co.*, 163 U.S. 169, 185-186, 16 S.Ct. 1002, 41 L.Ed. 118, 124-125 (1896) *Kellogg Co.* v. *National Biscuit Co.*, 305 U.S. 111, 120, 59 S.Ct. 109, 83 L.Ed. 73, 79 (1938).

2. The Record on Which the Proposed Brief Is Based Is Not Before This Court

Page 2 of the motion states with respect to the relationship between the case at bar and the Tenth Circuit case on which the proposed *amicus* brief is predicated:

> ". . . In actuality, however, the operative facts of the two cases are very diffierent . . ."

In "Reason" 4 (Motion, p. 5), Well Surveys and Dresser Industries assert the belief that "it would be helpful to the Court . . . to have an amicus brief *not limited to the precise factual situation in the case at bar.*"

Page 3 of the motion and many sections of the proposed brief include representations of would-be *amicus curiae* concerning the content of the Tenth Circuit

record which is not before this Court. It would manifestly be unfair, both to the Court and to the parties, to receive the proposed brief in the absence of the record—admittedly reflecting the "very different" "operative facts"—on which it is based.

In point of fact, the undefined "real alternative" to post-expiration royalties, to which Well Surveys and Dresser Industries repeatedly advert (Motion, p. 4, Reasons 1 and 2), may be no practical alternative at all depending as it does on equally undefined "negotiated terms" (Motion, p. 3). In the absence of the Tenth Circuit record, the proposed *amicus curiae* brief is meaningless.

Nor can equity and good conscience countenance the advocacy in this Court by proposed *amicus curiae* of their side of the Tenth Circuit case in the absence of their adversaries.

3. The Motion Is Untimely

The motion is belated as a consequence of the deliberate acts of Well Surveys and Dresser Industries.

Rule 42(2) of this Court provides:

> "2. A brief of an *amicus curiae* in cases before the court on the merits may be filed only after order of the court or when accompanied by written consent of all parties to the case and presented within the *time allowed for the filing of the brief of the party supported.*"

Would-be *amicus curiae first* requested consent of Petitioners to the filing of a brief *amicus curiae* on July 21, 1964. That request was refused on July 25,

1964.[2] Proposed *amicus curiae* took no action until *September 16, 1964*, almost two months later. Meanwhile, the time within which the proposed brief *amicus curiae* could properly have been presented under the provisions of Rule 42(2) expired on September 4, 1964, Respondent having accepted service of Petitioners' brief on the merits on August 5, 1964.[3]

4. Proposed Amicus Curiae Seek to Subvert the Mandate of the Tenth Circuit Court of Appeals

On August 28, 1964—over a month after consent to the proposed *amicus curiae* brief was refused by Petitioners—Dresser Industries and Well Surveys applied to the Tenth Circuit Court of Appeals for a certification of the misuse question in that case to this Court for concurrent disposition with the case at bar. That application for certification was denied by the Tenth Circuit on September 17, 1964.[4] *Amicus curiae* seek by the present motion to circumvent the mandate of the very appellate court in which their case properly is pending.

---

[2] A copy of the letter refusing consent is reproduced, *infra*, Appendix p. 9.

[3] A copy of the acceptance of service is reproduced, *infra*, Appendix p. 10.

[4] A copy of the letter of the Clerk of the United States Court of Appeals for the Tenth Circuit denying the certification is reproduced, *infra*, Appendix p. 11.

CONCLUSION

The motion should be denied in the interests of sound judicial administration and for failure to comply with the rules of this Court.

Respectfully submitted,

EDWARD S. IRONS
1000 Connecticut Avenue, N. W.
Washington 36, D. C.
Attorney for Petitioners

Of Counsel:

CHARLES, C. COUNTRYMAN
VELIKANJE & MOORE
Suite 4 - Yakima Legal Center
303 East "D" Street
Yakima, Washington

IRONS, BIRCH, SWINDLER & MCKIE
1000 Connecticut Avenue, N.W.
Washington 36, D. C.

APPENDIX

LAW OFFICES
IRONS, BIRCH, SWINDLER & MCKIE
ONE THOUSAND CONNECTICUT AVENUE
WASHINGTON 36, D. C.

July 25, 1964

Rufus S. Day, Jr., Esq.
McAfee, Hanning, Newcomer,
Hazlett & Wheeler
700 Terminal Tower
Cleveland 13, Ohio

Re: *Brulotte et al* v. *Thys Company*

Dear Mr. Day:

You have requested Brulotte *et al* to consent to the filing of a brief as *amicus curiae* in the subject case which is pending in the Supreme Court of the United States.

After due consideration I have reached the conclusion that we should not consent. It does not seem to me that your client stands in the position of a friend of the court. Rather, you are in the position of representing other parties in another pending action, the outcome of which you feel may be affected by the disposition of this case. It would be your purpose to influence the decision in favor of your client's position. The position which you would advance might well be contrary to the interests of Brulotte *et al*. Our acquiescence in the filing of a brief *amicus curiae* on behalf of your client would almost necessarily also require our acquiescence in the filing of a similar brief by your opponent. I do not think that the best interests of anyone would be served by such a proceeding.

I appreciate your courtesy in making your briefs, as well as the briefs of McCullough, available to me. The McCul-

lough briefs are returned herewith. I gratefully accept your offer to permit me to retain the copies of your briefs.

Very truly yours,

/s/ Edward S. Irons
Edward S. Irons

ESI:ed
Encls.
cc: Mr. Charles C. Countryman

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1964

Walter C. Brulotte and Cecelia Brulotte, his wife
and
Raymond Charvet and Blanche Charvet, his wife,
Petitioners,
v.
Thys Company, *Respondent.*

No. 20

Acceptance of Service

Service accepted of a copy of brief for petitioners this 5th day of August, 1964.

George W. Wilkins
Cheney & Hutcheson
Attorneys for Respondent
By /s/ Elwood Hutcheson
Elwood Hutcheson

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT
OFFICE OF THE CLERK
DENVER, COLORADO 80202

September 17, 1964

Mr. Rufus S. Day, Jr.
700 Terminal Tower
Cleveland 13, Ohio

Dear Mr. Day:

The Court has treated your letter of August 28, 1964, in cases No. 6952 to 6956, McCullough Tool Company et al. vs. Well Surveys, Inc., et al., as an application to this Court to certify to the Supreme Court of the United States the question of misuse, and has treated Mr. McDermott's letter of September 2, 1964, as an answer to your letter for certification; and an order has been entered today denying your application for certification of the misuse question.

Very truly yours,

/s/ ROBERT B. CARTWRIGHT
Robert B. Cartwright
Clerk.

RBC:avb

cc to:
Mr. Richard B. McDermott
Boesche, McDermott & Eskridge
Third Floor, Drew Building
Tulsa, Oklahoma 74103